IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

INCOME TAX REFERENCE No.292 of 1994

For Approval and Signature:
HONOURABLE MR.JUSTICE D.A.MEHTA Sd/-

HONOURABLE MS.JUSTICE H.N.DEVANI Sd/-

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?
2	To be referred to the Reporter or not ?
3	Whether their Lordships wish to see the fair copy of the judgment ?
4	Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?
5	Whether it is to be circulated to the civil judge ?

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COMMISSIONER OF INCOME TAX - Applicant(s)
Versus
AMARSINGHJI MILLS LTD. - Respondent(s)

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Appearance :
MR MANISH R BHATT for Applicant(s) : 1,
MR MJ SHAH for MR JP SHAH for Respondent(s) : 1

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CORAM : HONOURABLE MR.JUSTICE D.A.MEHTA
and
HONOURABLE MS.JUSTICE H.N.DEVANI
Date : 24/11/2005
ORAL JUDGMENT
(Per : HONOURABLE MR.JUSTICE D.A.MEHTA)

1. The Income-tax Appellate Tribunal, Ahmedabad Bench 'A' has referred the following question under Section 256(1) of the Income-tax Act, 1961

(the Act) at the instance of the Commissioner of Income-tax:

> "Whether, the Tribunal is right in law and on facts in holding that the new business carried out can be held to be the same as that of the earlier years, and therefore, the assessee is entitled to the benefit of carry forward and set off of accumulated losses ?"

2. The assessment year is 1983-84 and the relevant accounting period is the year ended on 30th June, 1982. The assessee, a Limited Company, claimed set off and carried forward of certain business losses which came to be disallowed by the Assessing Officer.

3. The assessee carried the matter in appeal before the Commissioner (Appeals) who confirmed the same. Hence, the matter was carried in Second Appeal before the Tribunal. The Tribunal, vide order dated 9th January, 1992, has allowed the assessee's appeal.

4. The assessee – company was manufacturing cloth

from yarn and then selling the same in the market. During the year under consideration the entire textile unit was sold to Kores India Limited. It is the case of the Revenue that the assessee started a new business of purchasing grey cloth from the market, sent it for processing and after having it processed sold the same in the open market. Therefore, the assessee was not entitled to benefit under Section 72 of the Act to carry forward and set off the accumulated losses pertaining to textile unit which had been sold off.

5. In light of the aforesaid fact situation, Mr.M.R.Bhatt, learned Senior Standing Counsel appearing on behalf of the applicant-revenue, invited attention to provisions of Section 72(1)(i) and the Proviso thereunder to submit that only in the event the assessee continued the business for which the loss had originally been computed would the assessee get the benefit under the provision. That the Tribunal had

committed an error in granting the benefit when, admittedly, the entire unit by which the assessee manufactured cloth was sold out, and thus the subsequent activity was entirely a new and distinct business. In support of the proposition, he placed reliance on decision of Madras High Court in the case of *Tube Suppliers Ltd. Vs. Commissioner of Income-tax*, [1985] 152 ITR 694 (Mad.).

6. Mr.M.J.Shah, learned advocate appearing on behalf of the respondent-assessee, invited attention to the finding recorded by the Tribunal to the effect that whether the two lines of the business constitute the same business or not had to be determined in light of the tests laid down by the Hon'ble Supreme Court in the case of *B.R. Ltd. Vs. V.P. Gupta, Commissioner of Income-tax, Bombay*, [1978] 113 ITR 647 (S.C.). That the Tribunal had recorded a finding that the assessee was having common management and common control of business viz.

there was unity of control. That the Tribunal had further found that whether the assessee manufactured the cloth itself or purchased the manufactured cloth would not make any difference and instead of processing the cloth itself if it got the same printed by way of job work and sold the same in market the business would remain the same and, therefore, the order of the Tribunal requires to be upheld.

7. In rejoinder Mr.Bhatt invited attention to the portion of the judgment of Madras High Court in the case of Tube Suppliers Limited (supra) wherein the Apex Court decision in case of B.R. Ltd. (supra) has been distinguished.

8. As can be seen from the provisions of the Act Section 72(1)(i) of the Act stipulates that for any assessment year, if the net result of the computation under the head “Profits and gains of business or profession” is a loss, the whole loss (subject to other provisions of Chapter-VI)

be carried forward to the following assessment year and shall be set off against the profits and gains of any business carried on by the assessee and assessable for that subsequent year. The Proviso thereafter imposes a further condition to the effect that the business for which the loss was originally computed is continued to be carried by the assessee in the previous year relevant for the following assessment year. Thus, the scheme of the Act envisages that, in the first instance, under Section 71 of the Act the loss incurred by an assessee can be set off against income from another head subject to fulfillment of the requisite conditions. That only balance loss which is not so set off under Section 71 of the Act is permitted to be carried forward. It is in this context that one has to appreciate and apply provisions of Section 72(1)(i) read with the Proviso thereunder.

9. Though the issue can not be said to be res

integra, yet the Apex Court has stated that the determination of the question whether an assessee is carrying on in two different accounting periods the same business depends essentially on the facts of each particular case, yet it is a mixed question of law and fact and the tests laid down by various decisions have to be applied to the facts found by the Tribunal.

10. In the judgment rendered by the Apex Court in B.R. Ltd. (supra) though the controversy brought before the Court related to provisions of Section 24(2) of the Indian Income-tax Act, 1922, prior to its amendment by the Finance Act, 1955, the Apex Court has categorically stated that “even under the amended provision, the consideration whether in the year of profit the assessee was carrying on the same business which he was carrying on in the year in which the unabsorbed loss occurred is not irrelevant. Indeed, it is not even irrelevant for the

purposes of Section 72 of the Income-tax Act, 1961, which corresponds to Section 24(2) of the 1922 Act. After the amendment of Section 24(2) in 1955 and under Section 72 of the Act of 1961, the right to carry forward an unabsorbed loss depends upon whether the assessee still carries on the business in which the loss was incurred. That involves consideration of the question whether the business carried on by the assessee is the same which he was carrying on when he suffered a loss."

11. After stating thus, it is laid down that for the purpose of determining whether the business is the same a fairly adequate test would be whether there was inter-connection, interlacing, inter-dependence and unity by the existence of common management, common business organisation, common administration, common fund and a common place of business. In the facts of the case before the Apex Court the assessee was originally importing certain articles from abroad which business came

to be dis-continued and the assessee started exporting articles manufactured in India to different foreign countries. The Apex Court held that the fact that the procedure involved in the two activities was entirely different was not by itself sufficient to establish that the business was not the same. That there was a common control and common management of the same Board of Directors carrying on both the activities in two different years.

12. Applying the tests to the facts found by the Tribunal, it can be seen that the Tribunal has recorded that the assessee had common management and common control of business. That there was no difference in the business carried on by the assessee in two different accounting periods considering the unity of control. Nothing has been pointed out on behalf of the applicant-revenue to even suggest that these findings of fact recorded by the Tribunal are not correct, except for making a faint effort that the

Tribunal had not found that there was common place of business. As can be seen from facts on record the decision in the case of B.R. Ltd. (supra) had been pressed into service on behalf of the assessee even before the Commissioner (Appeals) as well as the Tribunal. None of the authorities have been invited to render any such finding. Therefore, at this stage, it is not possible to raise a presumption that the place of business was not common, nor is it necessary to send the matter back for this limited purpose, considering the period which has elapsed, the accounting period being year ended on 30th June, 1982.

13. In the result, it is held that the Tribunal was justified in holding that the new business carried on by the assessee was the same business as in earlier years and the assessee was entitled to the benefit to carry forward and set off accumulated losses. The question is, accordingly, answered in the affirmative i.e. in

favour of the assessee and against the Revenue.

14. The reference stands disposed of accordingly. There shall be no order as to costs.

Sd/-
[D.A. MEHTA, J]

Sd/-
[H.N. DEVANI, J]

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*Bhavesh**